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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

Date: MAY 25 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Professional Holding an Advanced Degree or Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter will be remanded for action and a new decision.

The petitioner is a computer consultant and software developer. It seeks to employ the beneficiary permanently in the United States as a computer software engineer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Alien Employment Certification, approved by the United States Department of Labor (DOL). The labor certification was approved by the DOL on behalf of another alien. The director denied the petition based upon the determination that the petitioner failed to file it with a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

On appeal, counsel asserts that the Form I-140, Immigrant Petition for Alien Worker, was filed on July 16, 2007, and, therefore, the accompanying labor certification remained valid. Counsel provides a receipt notice from United States Citizenship and Immigration Services (USCIS), as well as additional documents in support of the appeal.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

> Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. The DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the DOL's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

Although the director determined that the filing of the petition in the instant case was after July 16, 2007, a review of evidence provided by counsel on appeal clearly demonstrates that the petition was filed on July 16, 2007. Thus, the petitioner was able to substitute the beneficiary and the petition was filed with a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). Therefore, the AAO will withdraw the director's decision and remand the case to the director for further action.

However, as there are deficiencies in the record, the appeal cannot be sustained and the petition cannot be approved.

In the instant case, the ETA Form 9089 was accepted by the DOL for processing on December 19, 2005. The proffered wage as stated on the ETA 9089 is $39.50 per hour or $82,160.00 per year. The ETA Form 9089 states that the position requires a master degree in computer science and two years experience in the job offered.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record is absent any evidence demonstrating the petitioner's continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Furthermore, a review of the electronic record reveals that the petitioner has filed approximately two dozen additional Form I-140 petitions for different beneficiaries that have been pending or approved since the priority date, December 19, 2005, of the instant petition. Consequently, the petitioner must establish the continuing ability to pay the proffered wages to these additional beneficiaries, as well as continuing ability to pay the proffered wage of $82,160.00 to the beneficiary in the instant case.

Furthermore, in order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on

the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

As previously noted, the priority date of the ETA Form 9089 is December 19, 2005. At part K. a. of the ETA Form 9089, which was signed by the beneficiary on June 25, 2007, the beneficiary claimed to be presently employed as a systems analyst by [redacted] in Valley, California, but failed to list the date he began such employment with this enterprise. A review of the evidence in the record, specifically Forms W-2, Wage and Tax Statement, reflecting wages paid by [redacted] to the beneficiary in 2005 and 2006, demonstrates that the beneficiary started working for this employer in 2005. Thus, the beneficiary cannot be considered to possess the required two years of experience in the offered job as of the priority date of December 19, 2005, as a result of his employment with [redacted]

At part K. b. of the ETA Form 9089, the beneficiary claimed to have been employed as a senior software engineer by [redacted] in Chaziabad, India from February 1, 2001 to November 23, 2003. In support of this claim of employment, the beneficiary provided an employment letter signed by [redacted], who listed his positions as president of [redacted]. Mr. [redacted] reiterated the beneficiary's claim to have been employed by this company from February 1, 2001 to November 23, 2003, and indicated that the beneficiary was sincere, honest, hardworking, and intelligent individual who had commanded the respect and affection of his colleagues and supervisors. However, the non-specific letter signed by Mr. [redacted] cannot be considered as sufficient evidence to establish

that the beneficiary possessed the required two years of experience in the offered job as of the priority date of December 15, 2005. The letter does not contain a specific description of the duties performed; thus, it cannot be concluded that the beneficiary is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1). Also, it is unclear how this claimed experience with Softpack 21 from February 1, 2001 to November 23, 2003, could have been full-time prior to December 2002 because the beneficiary was enrolled in his master's prior to that date.

In view of the foregoing, the director's denial of the petition will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.